

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
A La Carte And Themed Tier Programming)	MB Docket No. 04-207
And Pricing Options For Programming)	
Distribution On Cable Television And Direct)	
Broadcast Satellite Systems)	

**COMMENTS OF
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NATIONAL FOOTBALL LEAGUE,
NATIONAL BASKETBALL ASSOCIATION,
NATIONAL HOCKEY LEAGUE,
NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,
PGA TOUR, INC., and
WOMEN'S NATIONAL BASKETBALL ASSOCIATION**

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EXECUTIVE SUMMARY

Professional and Collegiate Sports believe that the public interest would not be served by regulations (a) requiring programmers to offer sports or other programming to Multichannel Video Programming Distributors (“MVPDs”) on an *a la carte* or themed-tier basis; or (b) prohibiting programmers from negotiating over the specific tiers on which MVPDs place programming services.

A large majority of MVPD subscribers, cutting across all demographics, watch sports programming as it is currently available to them through a wide variety of viewing options – ranging from universally available broadcast stations to cable networks, superstations, regional sports and other networks available on specific tiers, to services available as *a la carte* offerings. Any requirement mandating the availability of all sports programming on an *a la carte* or themed-tier basis would unnecessarily diminish access of subscribers to compelling sports programming that creates interest transcending the hard core sports fan and that encourages even non-fans to sample sports programming. Even if MVPDs continued to offer their current tiers of service in addition to *a la carte* or themed tiers, any *a la carte* or themed-tier requirement would necessarily increase the prices of the programming subscribers currently receive, or reduce the vast amount of programming available to them at the price they currently pay.

Furthermore, the concept of an *a la carte* or themed-tier programming requirement raises numerous, intricate, and difficult questions of regulatory and statutory law. Those questions are generated by the very nature of the cable programming industry that has developed over many decades in response to the market for cable programming. Any effort to unwind the industry as structured and as regulated by Congress and the Commission necessarily faces monumental hurdles and would likely lead to unintended consequences that would not promote the public interest.

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COMMENTS OF THE PROFESSIONAL AND COLLEGIATE SPORTS

The Office of the Commissioner of Baseball, the National Football League, the National Basketball Association, the National Hockey League, the National Collegiate Athletic Association, the PGA Tour, Inc., and the Women's National Basketball Association (collectively, "Professional and Collegiate Sports") submit the following comments in response to the Commission's May 25, 2004 Notice entitled "Comment Requested on A La Carte And Themed Tier Programming And Pricing Options For Programming Distribution On Cable Television And Direct Broadcast Satellite Systems, MB Docket No. 04-207 (DA 04-1454).

I. THE CURRENT SYSTEM PROVIDES THE AMERICAN PUBLIC WITH A WIDE VARIETY OF OPTIONS TO ENJOY PROFESSIONAL AND COLLEGIATE SPORTS PROGRAMMING

The Professional and Collegiate Sports produce some of the most popular television programming in the United States. Professional and Collegiate Sports provide various programming packages by contracting with a wide variety of distributors – including local broadcast stations, broadcast networks, basic cable networks, digital tier cable networks, and the MVPDs themselves (through *a la carte* out-of-market packages and proprietary cable networks). In addition, certain of the Professional and Collegiate

Sports offer telecasts of individual games (live and recorded) on an on-demand basis through digital cable and the Internet. The result of these efforts is the availability each year of thousands of telecasts of the Professional and Collegiate Sports events and large amounts of other sports-related content to television viewers on a wide variety of channels and packages.

A. Major League Baseball

The Office of the Commissioner of Baseball (“Baseball”) represents the 30 clubs that are engaged in the business of organizing and presenting more than 2400 Major League Baseball games each year. Baseball and its clubs make telecasts of virtually all of their games available to the public through their rights-holding partners. Baseball has an agreement with the FOX Network, which carries a number of regular season games on a national and regional basis. FOX also televises on a national basis the All-Star Game, several Divisional Series games, and all League Championship Series and World Series games. Major League Baseball games are also available nationally through the ESPN, ESPN2 and TBS cable networks, as well as Superstation WGN. In addition, the individual Major League Baseball clubs have entered into agreements that allow local broadcast stations and regional sports networks to telecast regular season Major League Baseball games on a regional basis. Baseball also provides telecasts of Major League Baseball games directly to MVPDs through its Extra Innings out-of-market package, through which MVPD subscribers can access the telecasts of more than 1400 games not otherwise available to them.

B. National Football League

The National Football League (“NFL”) has carefully structured its television distribution strategies to provide broad-based access to football programming to the fans

of the NFL's 32 member clubs. Every NFL regular season and playoff game -- up to 14 games on any given Sunday -- is broadcast on free, over-the-air television. In addition, one game per week is available nationally on ESPN and also is simulcast on over-the-air television in the two participating clubs' television markets and another is telecast nationally on Monday night on ABC. NFL games are among the most popular television programming in the country on both broadcast television *and* cable. An average of 110 million people per week watched some or all of an NFL regular season game telecast in 2003. Nine of the 10 most highly rated cable programs were NFL games in that year, including the top eight.

The NFL and its member clubs also license content, from highlights to complete games, to local broadcast stations, national broadcast networks, basic cable channels (ESPN and others), and premium cable channels. The NFL and its member clubs also have recently created their own cable channel, the NFL Network, available on DirecTV and a number of cable systems. The NFL also licenses content to television programs distributed through a wide variety of channels, such as HBO's *Inside the NFL*, Turner Classic Sports, NFL Films, and programs by local network affiliates. Finally, the NFL offers an out-of-market game package, NFL Sunday Ticket, which allows viewers to purchase a subscription to access the Sunday afternoon NFL broadcasts that, due to time conflicts, are not telecast on over-the-air stations in the subscriber's area. Thus, the NFL has a keen interest in the potential effect that a la carte or theme-tier pricing schemes would have on the sports programming options available to cable and satellite viewers, notwithstanding its focus on broadcast television and, to a lesser extent, broadly distributed cable networks as distribution outlets for its live games.

C. National Basketball Association

The National Basketball Association (“NBA”) and its 30 member teams provide thousands of hours of nationally and locally distributed programming across a wide range of broadcast and non-broadcast (i.e., cable and satellite) outlets. Approximately 1200 NBA games are telecast each year in one or more languages. NBA games are broadcast over-the-air nationally on ABC and on Telemundo. NBA games (and a variety of other original programs, features and highlights) are also carried nationally by the ESPN, ESPN2, TNT and NBA TV cable networks. Individual NBA teams also license game programming over broadcast stations and regional cable networks. “NBA League Pass,” a supplementary out-of-market offering distributed on an *a la carte* basis through DirecTV, EchoStar and iN Demand, allows fans to receive even more NBA games. In addition, NBA Entertainment licenses NBA-related programming to a number of broadcast, cable, and satellite networks – from the Food Network to ABC – and directly to MVPDs and Internet distributors for airing on a regular and/or on-demand basis.

D. National Hockey League

With 30 teams in the U.S. and Canada, the National Hockey League (“NHL”) has recently renewed its national cable network contract with ESPN and has entered into an over-the-air network agreement with NBC. In addition, the NHL has three national contracts with Canadian networks for regular season and playoff telecasts. All clubs also originate regular season and select playoff games locally and regionally, using over-the-air television stations and/or cable networks. Moreover, the NHL licenses a league-wide out-of-market package of games, branded “NHL Center Ice,” available through satellite and digital cable in the U.S. At the beginning of the 2001-2002 season, the NHL, in conjunction with two Canadian companies, The Sports Network and Insight Sports,

launched The NHL Network, a 24-hour hockey channel for distribution in Canada. The principal focus of the channel has been a nightly show, “On the Fly,” covering games in progress, live “look-ins,” and highlights.

E. National Collegiate Athletic Association

The National Collegiate Athletic Association (“NCAA”) is a voluntary association of approximately 1,200 colleges and universities involved in intercollegiate athletics. Of its 87 men’s and women’s championships in 22 sports, a number are broadcast over-the-air nationally, pursuant to the NCAA-held copyright. These include the Men’s and Women’s Division I Basketball Championships, among the most popular television programming in the country. Satellite subscribers can also purchase “March Mega Madness,” which provides access to the non-locally broadcast first three rounds of the Division I Men’s Basketball Tournament and, through ESPN’s “Full Court,” every out-of-market Women’s Basketball Championship Tournament Game. In addition to the programming efforts of the NCAA itself, NCAA member institutions and conferences offer a huge volume of over-the-air, cable and satellite programming in nearly two dozen different sports on various networks. These include regular season games, conference post-season competition, Division I-A Football Bowl Games, and all-star games.

F. PGA Tour, Inc.

The PGA Tour, Inc. (“Tour”) operates three tours: the PGA Tour, the Champions Tour, and the Nationwide Tour, as well as co-sanctioning the World Golf Championships. The Tour is the exclusive copyright holder of coverage of all of these events. Through 2006, the Tour has licensed rights to the ABC, CBS, and NBC broadcast networks, as well as ESPN, USA Network, and the Golf Channel as cable and

satellite distributors. The Tour and its network partners also produce and distribute worldwide significant amounts of preview, review, and other highlight programming.

G. Women's National Basketball Association

The Women's National Basketball Association ("WNBA"), comprised of 13 teams, is the leading women's professional sports league in the United States. Five different national networks – the ABC over-the-air network, and the ESPN, ESPN2, NBA TV and Oxygen cable networks – telecast almost 100 WNBA games each season. In addition, WNBA teams license the telecast of regular season games to local and regional broadcast and cable network outlets. WNBA Enterprises also licenses non-game and "lifestyle" programming to a number of networks (e.g., Oxygen and, in prior years, Lifetime) that typically do not offer sports programming.

II. AN A LA CARTE OR THEMED-TIER PROGRAMMING REQUIREMENT WOULD HARM THE VAST MAJORITY OF MVPD SUBSCRIBERS WHO WATCH SPORTS PROGRAMMING

The Commission's Notice asks for comment on the question of "what would the impact be on retail rates to consumers if programmers, in addition to the currently offered packages, were required to allow MVPDs to offer their programming on an *a la carte* or themed-tier basis if the MVPD chose to do so?" Notice at 2. Professional and Collegiate Sports believe that a mandatory *a la carte* or themed-tier programming requirement would harm the vast majority of consumers who watch sports programming by raising the cost of that programming – both in dollar terms and in terms of choice and convenience.

It is important to recognize that the sports programming offered by the Professional and Collegiate Sports attracts viewing from the vast majority of MVPD subscribers. Indeed, the data associated with a single sport – Major League Baseball –

demonstrates this principle. According to Nielsen Media Research, in the first three months of the 2003 season alone, 70% of MVPD households watched at least a portion of the Major League Baseball games available on the cable networks ESPN, ESPN2, TBS and Superstation WGN. In addition, more than 175 million Americans watched some portion of the Major League Baseball playoffs in the month of October, 2003, and postseason games were watched in more than 75% of American television households. This popularity extends to all age groups and among women and men alike; about 50% of the women between 18-34 and more than 60% of men 55 or older watched some of the Major League Baseball game telecasts on ESPN, ESPN2, TBS and Superstation WGN during the first three months of the 2003 season. These figures demonstrate the breadth of the interest among MVPD subscribers in sports programming – which is available on nearly every level of service available to them. Indeed, as a result of the wide popularity of sports programming, the top eight most widely viewed programs on cable networks last year (and nine of the top ten) were NFL game telecasts.

The wide popularity of and strong demand for sports programming has already created a great deal of choice in the cable marketplace for both dedicated and casual sports fans to receive the amount of sports programming they desire. Sports programming is available in every type of package that MVPDs offer:

- On the basic or “broadcast” tier, sports programming is available through the telecasts of the broadcast networks, such as the MLB on Fox, the NFL on Fox, ABC and CBS, the NBA on ABC, the NHL on NBC (Spring 2005), collegiate football and basketball on CBS, and the PGA Tour on ABC, CBS and NBC.
- Sports programming is also available on the basic tier through the telecasts of sporting events by local broadcast stations, such as the telecasts of the Baltimore Orioles on WJZ-TV, the Detroit Red Wings on WKBD-TV, the Philadelphia 76ers on WPSG-TV, the pre-season (and ESPN simulcast) games of the Minnesota Vikings on KSTP-TV in Minnesota.

- Sports programming is also typically available on the basic tier through the retransmission of Superstation WGN and carriage of TBS¹, which telecast a large number of sporting events each year, including games involving the Chicago Cubs, the Chicago White Sox, the Atlanta Braves, and the Chicago Bulls.
- On the next level of service, the “expanded basic” tier, sports programming is provided by principally general entertainment and sports-focused networks. ESPN and ESPN2, the most popular sports networks, telecast a large number of sporting events conducted by the Professional and Collegiate Sports. While ESPN and ESPN2 are the most prominent of the sports-focused networks on the expanded basic tier, general entertainment channels such as TNT (the NBA on TNT), USA (PGA Tour), and Oxygen (WNBA) also offer sports programming.²
- Regional sports networks – cable networks that are focused on delivering sports programming involving local teams to a regional population – also generally appear on the expanded basic tier. The regional sports networks typically provide the telecasts of the local teams from multiple professional and sports leagues, such as Comcast SportsNet in Washington D.C., which provides telecasts of games involving the Baltimore Orioles, the Washington Wizards and the Washington Capitals, and high-definition telecasts of preseason Washington Redskins games (which also are available in standard definition on WUSA-TV).
- On the so-called “digital tier,” there are additional networks that offer MVPD subscribers access to even more, and, in some cases, more narrowly focused sports programming. A number of MVPDs provide broad-based sports programming networks such as ESPNNews and ESPN Classic on the digital tier. The digital tier often also includes narrowly focused sports networks such as NBA TV, SpeedVision, or the Golf Channel.
- Finally, a large number of MVPD subscribers are already able to access sports programming on an *a la carte* basis through the out-of-market and special programming packages offered by certain of the Professional and Collegiate Sports. The most dedicated baseball fans can access more than 1400 Major League Baseball telecasts each year by subscribing to the Extra Innings package, which provides *only* the telecasts of out-of-market Major League Baseball games to Extra Innings subscribers for a charge ranging from \$129 to

¹ Cable systems often carry superstations on the basic tier. Because TBS was formerly a superstation (WTBS-TV Atlanta), many cable systems still carry TBS on their basic tier.

² Some single-sport networks also are offered by some carriers on their expanded basic tiers -- for example, the NFL Network is offered on DirecTV's Total Choice package, and the Golf Channel is offered on the expanded basic tier by a number of cable systems.

\$149 per year. MVPDs offer similar packages from the NBA (League Pass), the NFL (Sunday Ticket), the NHL (Center Ice), and by the NCAA during the NCAA Basketball Tournament.

This diversity of approaches and programming offered permits MVPD subscribers a great deal of choice in the amount of sports programming they can purchase. Virtually all cable subscribers (and most DBS subscribers) will have access to the sports programming on the local broadcast stations available on the “broadcast tier.” From this level of service, subscribers can purchase an increasing amount of sports programming (and more focused sports programming) on the expanded basic and digital tiers. The most dedicated sports fans also have the *a la carte* option of purchasing the out-of-market and special packages. These *a la carte* packages, like premium movie networks, are priced more expensively than other tiers of service – reflecting in large part the smaller subscriber base that is willing to spend the extra money to purchase such packages. This hierarchy of packages thus allows those dedicated sports fans willing to pay more for sports programming to receive such programming, while still maintaining the general availability of some sports programming to all subscribers at lower rates.

If a mandatory *a la carte* or themed-tier regime were imposed on cable networks and MVPDs (and, by implication, programmers), the price of individual cable networks will rise to compensate for lost advertising revenues. This, in turn, would increase the cost of existing packages to subscribers who chose not to purchase channels on an *a la carte* or themed-tier basis. On the other hand, those who purchase on an *a la carte* or themed-tier basis would likely receive much less programming for prices comparable to what they paid before the *a la carte* or themed-tier requirement was implemented.

A mandatory *a la carte* or themed-tier regime would thus actually *reduce* the amount of choice for MVPD subscribers by providing non-broadcast sports programming

only to those subscribers willing to make the financial commitment to the channels or packages that carry it. Because not all subscribers will choose to purchase such channels or packages, the channels and packages will inevitably be priced higher (as with current *a la carte*) offerings. As a result, the MVPD subscribers who may be casual sports fans or may only sample sports programming are, in effect, forced to make the same *a la carte* commitment as those dedicated sports fans who choose the out-of-market and special packages. The choice to receive some amount of sports programming beyond the basic broadcast offerings as part of a broader package – which consumers appear to enjoy – is lost if consumers are forced into an *a la carte* or themed-tier regime.³

An *a la carte* or themed-tier requirement would not only raise the prices for the large majority of households that already watch and enjoy sports programming, but would reduce the ability of non-sports fans to “sample” sports programming. The existing cable marketplace, developed over decades, has fostered the ability of MVPD subscribers to engage in sampling of sports programming. For example, it was the broad availability of Superstation WGN and ESPN on popular programming tiers that allowed MVPD subscribers to follow the historic home run record chase between Sammy Sosa and Mark McGwire in 1998. That exciting programming brought in many viewers who would not otherwise consider themselves baseball or even sports fans, and led to increased interest in Major League Baseball.⁴

³ This would be particularly true for certain popular types of programming where basic cable channels supplement broadcast offerings. For example, early rounds of Tour golf tournaments may be lost to the majority of consumers under an *a la carte* model.

⁴ The Professional and Collegiate Sports consider the sampling of their programming through wide distribution of that programming very important. Requiring the *a la carte* or themed-tier carriage of programming channels may thus encourage some of the Professional and Collegiate Sports to move some portion of their programming away

Footnote continued on next page

The Professional and Collegiate Sports thus firmly believe that the imposition of a mandatory *a la carte* or themed-tier regime would be mistaken. The Professional and Collegiate Sports support the programming and distribution solutions that have been created by and will continue to evolve with the marketplace. These programming and distribution solutions make some amount of sports programming available to virtually all subscribers at a lower price, allowing even non-sports fan subscribers to sample and enjoy sports programming.

III. AN A LA CARTE OR THEMED-TIER PROGRAMMING REQUIREMENT WOULD RAISE NUMEROUS AND SUBSTANTIAL REGULATORY AND STATUTORY QUESTIONS WITH REGARD TO SPORTS PROGRAMMING AND OTHER CONTENT

The Commission's Notice asks for comment on the question of "[w]hat, if any, Constitutional or other legal questions would be raised if Congress required programmers to offer their channels to MVPDs on a stand-alone basis and prohibited them from requiring carriage of their programming on particular tiers?" Notice at 3. The Professional and Collegiate Sports submit that numerous and substantial regulatory and statutory questions would be raised by a mandatory *a la carte* or themed-tier regime. The very number and complexity of these questions suggests that there is considerable doubt that such a mandate would be practicable and could lead to unintended consequences.

There are numerous questions about the harmonization of an *a la carte* or themed-tier programming requirement with existing law and regulations. The Commission's Notice (at page 3) contemplates that local broadcast stations could be subject to an *a la*

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from sports-focused networks to other networks that feature more broad-based programming, thus negating the intended affect of the *a la carte* or themed-tier requirement.

carte requirement. Current law, however, requires cable systems to provide all local and non-superstation distant broadcast stations on a tier available to all subscribers. *See* 47 U.S.C. § 543. Similarly, cable systems retransmit broadcast signals pursuant to the compulsory copyright license of 17 U.S.C. § 111, under which the cable industry carries thousands of broadcast stations and currently pays approximately \$120 million in royalties to copyright owners each year. That compulsory license requires cable systems to pay royalties based on a percentage of revenues associated with the tiers of service they offer that include broadcast station retransmissions. *See* 17 U.S.C. § 111(d); 37 C.F.R. § 201.17(b)(1). The cable compulsory license and the specific royalty rates mandated by the license were enacted – like the basic-tier carriage requirement – with tiers of service in mind. *See Cablevision Systems Development Corp. v. Motion Picture Ass’n of America*, 836 F. 2d 599, 610-11 (D.C. Cir. 1988). The implementation of an *a la carte* regime in the context of the broadcast tier thus (1) may require must-carry and current retransmission consent laws to be reopened, and (2) may raise several substantial questions about the manner in which cable systems would compensate copyright owners (including the Professional and Collegiate Sports) for the use of their copyrighted works.

From a regulatory perspective, the implementation of an *a la carte* or themed-tier regime would produce substantial questions concerning the treatment of sports programming. One concept raised in the media⁵ concerning a themed-tier requirement would be the creation of a “family tier.” Sports programming is, without question, programming that can be viewed by the entire family, and would fit well within a “family

⁵ *See, e.g.*, Bruce Alpert, “McCain Is Seeking A La Carte Cable; Cox CEO Says Switch Would Increase Costs,” *New Orleans Times-Picayune*, p. 9 (Mar. 26, 2004).

tier.” The inclusion or exclusion of sports programming networks from a “family tier” would raise important questions about exactly how a “family tier” should be defined. Similarly, there is a substantial question over what would be included in a “sports tier.” Many of the Professional and Collegiate Sports make their programming available on general entertainment networks such as TBS, TNT and FX. In fact, as many or more Major League Baseball game telecasts are available to consumers on general entertainment services such as Superstation WGN and TBS than are typically available on a regional sports network. Again, the inclusion or exclusion of such general entertainment programming networks from a “sports tier” raises difficult questions about the definition of such a tier. Indeed, an even more fundamental question is raised about who would define such tiers – either Congress by law, the Commission by regulation, or the MVPDs themselves.

There are also substantial questions about what *a la carte* itself would mean to programmers and consumers. Would consumers be able to change their choices of *a la carte* networks or packages on a daily basis (essentially creating an *on demand* marketplace) or would MVPDs be able to put limits on the ability of consumers to make *a la carte* purchases? This question is of high relevance to the Professional and Collegiate Sports, who provide event programming that varies over the course of the year – often including regular season games, playoff rounds, and championships – and as a result, there may be a different demand for channels that carry sports programming over the course of a year.

There are other questions as to whether regulations implementing an *a la carte* or themed-tier requirement would have to be expanded to other aspects of the MVPD-

subscriber relationship to be effective and equitable. Currently, it is common for MVPDs to require that certain tiers be purchased (e.g., the broadcast and expanded basic tiers) before subscribers may access *a la carte* premium offerings. Would an *a la carte* or themed-tier regime regulation allow or eliminate such buy-throughs? If buy-throughs were permitted, would the regulations inhibit the ability to discriminate among types of themed-tiers? For example, because of the wide popularity of sports programming, MVPDs may want to capitalize on that popularity by requiring consumers to “buy through” other themed-tiers to be able to purchase a “sports tier” or an out-of-market package. In that case, a large part of the perceived benefit of the *a la carte* or themed-tier regime would be lost to those consumers interested in the sports tier or out-of-market package. The Professional and Collegiate Sports are concerned that the very popularity of sports programming would create the possibility that sports programmers would absorb an unfair proportion of the costs of moving to an *a la carte* regime.

CONCLUSION

For the reasons discussed above, the Professional and Collegiate Sports urge the Commission not to propose any regulations that would either mandate that programming be offered on an *a la carte* or themed-tier basis or disallowing carriage agreement provisions that mandate distribution of programming services on specified tiers or service.

Respectfully submitted,

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